(2)

No. 96-1051

In The

Supreme Court of the United States

October Term, 1996

STATE OF ILLINOIS,

Petitioner,

v.

RICHARD C. NITZ,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

AVIVA FUTORIAN
Counsel of Record
2440 North Lakeview Avenue
Chicago, Illinois 60614
773/348-3899

RICHARD E. CUNNINGHAM
3445 North Janssen Avenue
Chicago, Illinois 60657
773/472-0096

Counsel for Petitioner

February 6, 1997

16 pp

CAPITAL CASE

QUESTIONS PRESENTED

I. Should the Court grant certiorari to review a question never passed on by the Illinois Supreme Court and based on facts not relevant to the case at hand?

II. Should the Court grant certiorari to review the Illinois Supreme Court's holding that Richard Nitz was denied due process where the State had withheld from him and his counsel the fact that it was medicating Richard Nitz with psychotropic drugs at the time of trial?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE PETITION WHOLLY MISCHARACTERIZES THE ILLINOIS SUPREME COURT'S HOLDING AND IS BASED ON A "FACT" UNSUPPORTED BY THE RECORD AND CONTRARY TO THE COURT'S EXPRESS FACTUAL FINDING 4

II. THE ILLINOIS COURT'S HOLDING THAT THE STATE'S SECRET ADMINISTERING OF MIND-ALTERING DRUGS VIOLATED DUE PROCESS IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS 6

III. THE DECISION BELOW HAS NO IMPACT BEYOND RESPONDENT'S UNIQUE CASE 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: PAGE

Arizona v. Youngblood, 488 U.S. 51, 58 (1988) 6, 7

Brady v. Maryland, 373 U.S. 83 (1963) 6, 7

Brown v. People, 8 Ill. 2d 540, 134 N.E.2d 760 (1956) 7n

Drope v. Missouri, 420 U.S. 162 (1975) 2, 7

Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993) 9n

Hicks v. Oklahoma, 447 U.S. 343 (1980) 3, 8

Pate v. Robinson, 383 U.S.375 (1966) 2, 7

People v. Brandon, 162 Ill. 2d 450, 643 N.E.2d 712 (1995) 1, 2, 7n

People v. Eddmonds, 143 Ill. 2d 501, 512, 578 N.E.2d 952 (1991) 7n

People v. Harris, 113 Ill.App.3d 663, 447 N.E.2d 941 (1983) 7n

People v. McLain, 37 Ill. 2d 173, 226 N.E.2d 21 (1967) 7n

People v. Murphy, 72 Ill. 2d 421, 381 N.E. 2d 677 (1978) 2, 7n

People v. Nitz, 173 Ill. 2d 151, 670 N.E.2d 672 (1996) . . . . . *passim*

People v. Pugh, 157 Ill. 2d, 623 N.E.2d 255 (1993) 9n

People v. Sanchez, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996) 7n

People v. Smith, 44 Ill. 2d 82, 254 N.E.2d 492 (1969) 7n

Prichard v. Lockhart, 990 F.2d 351 (8th Cir. 1993) 9n

Riggins v. Nevada, 504 U.S. 127 (1992) 2, 5n, 6, 7

STATUTES:

Ill. Rev. Stat. ch. 38, para. 104-11(a) (1987) 1

Ill. Rev. Stat. ch. 38, para. 104-21(a) (1987) 1, 5

Pub. Act 89-0689, § 90 (eff. December 31, 1996), codified at
Ill. Rev. Stat. ch. 38, para. 104-21(a)(1997) 10

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Richard Nitz was found guilty of murder in a jury trial. He waived a jury for sentencing, the judge sentenced him to death, and his conviction and sentence were affirmed on direct appeal.

At the time of Nitz's trial, Illinois law required the trial court to conduct a hearing to determine a defendant's fitness to stand trial either where a bona fide doubt of fitness is raised by any party before, during or after trial or where the defendant is receiving psychotropic drugs at the time of trial. Ill. Rev. Stat. ch. 38, ¶s 104-11(a) and 104-21(a) (1987) (codified as 725 Ill. Comp. Stat. 5/104-11(a) and 21(a)); *People v. Brandon*, 162 Ill.2d 450, 643 N.E.2d 712, 716-17 (1994).

In his appeal from the dismissal of his state post-conviction petition, Richard Nitz contended that "the State withheld information that it was administering psychotropic medication to him throughout the course of his trial and sentencing." *People v. Nitz*, 173 Ill. 2d, 151, 155, 670 N.E.2d 672 (1996); Petition for Writ of Certiorari ("Petition") at App. 3. Mr. Nitz argued "that the State's failure to disclose that it administered psychotropic medication to him during the course of trial deprived him of . . . due process of law." *Nitz,* 173 Ill. 2d at 157; Petition at App. 5.[1] The State did not contest before the Illinois Supreme Court the factual premises of Mr. Nitz's claim, as the heading of the State's argument in that Court makes plain:

---

[1] The defendant submitted his and his trial attorney's affidavits to the effect that neither was aware, at the time of trial, that the State was giving the defendant psychotropic drugs. *Nitz,* 173 Ill. 2d at 158; Petition at App 6.

"DEFENDANT SHOULD NOT AUTOMATICALLY BE GIVEN A NEW TRIAL, *DESPITE THE FACT THAT HE WAS NOT INFORMED THAT THE STATE WAS MEDICATING HIM.*" State Brief in Ill. S. Ct., p. 58 (emphasis added). The Illinois Supreme Court expressly noted that "[t]he State does not dispute defendant's assertions concerning the medication. . . ." *Nitz*, 173 Ill. 2d at 157; Petition at App. 5.

The Illinois Supreme Court agreed with Richard Nitz's argument that the State's withholding from him and his attorney the information that it had been giving him psychotropic drugs at the time of trial violated Nitz's due process right to inquiry into the question of whether he was fit for trial in light of the administering of such drugs.[2] The Court relied upon *People v. Murphy*, 22 Ill. 2d 421, 430, 381 N.E. 2d 677 (1978), *Pate v. Robinson*, 383 U.S. 375 (1966), *Drope v. Missouri*, 420 U.S. 162 (1975), and *Riggins v. Nevada*, 504 U.S. 127 (1992).

The Court went on to hold that had the trial court been informed that the defendant was being administered psychotropic drugs, it would have been duty-bound by statute to hold a fitness hearing. The Court relied on its prior decision in *People v. Brandon*, 162 Ill.2d 450, 643 N.E.2d 712, 716-17 (1994), which had delineated the mandatory nature of the statutory right and had further established that the failure of trial counsel who is aware of his client's ingestion of such drugs to invoke the statutory right constituted ineffective assistance of counsel. *Nitz*, 173 Ill. 2d at 158-62; Petition at App. 7-9. The Court was careful to note that the right to a fitness hearing for one receiving psychotropic drugs was "wholly statutory" but that because the

---

[2] The Court noted the uncontested testimony of an expert that the possible side effects of Tranxene, the drug Richard Nitz was given, are drowsiness, confusion, depression, nervousness, and substantial disorientation, so that any individual's ability to make decisions could be affected by ingesting this drug. *Nitz*, 173 Ill. 2d at 158; Petition at App. 6.

right flowed from his due process right to make an adequate inquiry, due process had been denied. "As such, defendant's claim constitutes more than a statutory violation and is properly cognizable under the Post-Conviction Hearing Act." *Nitz*, 173 Ill. 2d at 160-61; Petition at App. 8.

The Court further determined that the appropriate remedy was a new trial because Richard Nitz could not receive the reliable fitness hearing to which he was entitled in a *nunc pro tunc* proceeding six years after the trial. *Nitz*, 173 Ill. 2d at 163-64; Petition at App. 13.

In dissent, Justice Miller, joined by Bilandic and Heiple, J.J., wrote that "[w]hile the defendant correctly observes that the arbitrary denial of a statutory right may give rise to a due process violation (*Hicks v. Oklahoma*, 447 U.S. 343 (1980)), that principle is of no assistance . . . . [because] [t]he defendant never sought a hearing under section 104-21(a), and the trial judge in this case did nothing that was contrary to the terms of the statute." *Nitz*, 173 Ill. 2d at 166; Petition at App. 15. The arbitrary denial of the statutory right that Nitz had asserted was the denial by the prosecutorial arm of the state in withholding the information, and it was that denial on which the majority opinion was based.[3]

---

[3] In his reply brief in the Court below (at page 5), Richard Nitz had argued, "Here, the State's failure to disclose its medicating of Mr. Nitz arbitrarily deprived him of his substantial and legitimate expectation [pursuant to sec. 104-21(a)] that he would not be put to trial without a judicial fitness determination."

REASONS FOR DENYING THE WRIT

I. THE PETITION WHOLLY MISCHARACTERIZES THE ILLINOIS SUPREME COURT'S HOLDING AND IS BASED ON A "FACT" UNSUPPORTED BY THE RECORD AND CONTRARY TO THE COURT'S EXPRESS FACTUAL FINDING.

The Petition is frivolous because it seeks review of an issue never decided by the Court below and premised on a "fact" which does not exist. The Petition posits the holding of the Illinois Supreme Court in pertinent part as follows:

> A majority of the Illinois Supreme Court has held that if a criminal defendant, at or near the time of trial, *voluntarily* ingests psychotropic drugs . . . , *the trial court's failure to* invoke a state statutory provision entitling defendants taking psychotropic drugs to a fitness hearing, results in a *per se* violation of the defendant's federal constitutional right to inquiry into the issue of his . . . competence . . . .

Petition at 10 (emphasis added). The State of Illinois' (the "State") entire argument as to why this Court should grant review is based on the above assertion. Yet even a cursory reading of the Illinois Supreme Court's opinion demonstrates that the Court decided an entirely different due process question based on very different (and undisputed) facts.

The Court twice clearly stated the issue it was deciding: "In this appeal, defendant contends . . . that he is entitled to a new trial *because the State withheld information that it was administering psychotropic medication to him throughout the course of his trial and sentencing*." 173 Ill. 2d at 155; Petition at App. 3; ". . .[W]e consider the merits of the defendant's due process claim. *Defendant contends that the State's failure to disclose that it administered psychotropic medication to him during the course of trial deprived him of a fitness hearing and, thus, due process of law.*" 173 Ill. 2d at 157; Petition at App. 5 (emphases added). In addition, the Court set out the evidence which established that the State had failed to disclose its drugging of Richard Nitz and noted that "[t]he State does not dispute defendant's assertions concerning

the medication. . . ."[4] 173 Ill. 2d at 157-8; Petition at App. 5.

The Illinois Supreme Court then decided the issue, holding that the State's failure to disclose violated due process because, if the trial "court had known that defendant was being administered psychotropic drugs, the court would have been dutybound to invoke adequate procedures [set out in Illinois' fitness statute] which would have afforded defendant the opportunity for an inquiry on the issue of his fitness." *Nitz*, 173 Ill. 2d at 160; Petition at App. 9. The Court then noted that the particular statutory procedure relevant to an inquiry concerning the ingestion of psychotropic medications (§ 104-21(a)) called for a fitness hearing. The Court determined that the due process violation had led to the denial of the "wholly statutory" right to a fitness hearing, and it granted a new trial. *Id.*

As is readily apparent, contrary to the State's specious contentions, the Illinois Supreme Court never faulted the trial court or held that a trial court unaware of the medication question violates due process for failing to hold a fitness hearing. Nor did the Court in any way suggest that its holding encompassed a situation where a defendant had "voluntarily" ingested psychotropic drugs. Rather, the linchpin of its due process holding was the critical fact that the State had failed to inform Richard Nitz, his counsel, or the trial court that it was feeding Mr. Nitz psychotropic drugs.

The State's assertions to the contrary before this Court are false[5] and demonstrate that

---

[4] See argument heading from State's Illinois Supreme Court Brief, cited at page 2, *supra*.

[5] Not only does the State repeatedly claim, contrary to the record, that Richard Nitz "voluntarily" took the drugs; it has the audacity to assert that the State's secret drugging of him did not equate with the forced drugging this Court found violative of due process in *Riggins v. Nevada*, 504 U.S. 127 (1992). *See* Petition at 19-21; *see also* Petition at 5, claiming that Mr. Nitz "has never claimed that he was forcibly medicated." This argument collapses under the

the request for review is frivolous.

II. THE ILLINOIS COURT'S HOLDING THAT THE STATE'S SECRET ADMINISTERING OF MIND-ALTERING DRUGS VIOLATED DUE PROCESS IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

There is nothing novel much less inappropriate about the Illinois Supreme Court's holding that the State's secret administration of mind-altering drugs to Richard Nitz during his trial and capital sentencing hearing violated due process.

In *Riggins v. Nevada*, 504 U.S. 127, 118 L.Ed.2d 479 (1992), this Court held that a capital case defendant had been deprived of due process when the trial court allowed the State to forcibly medicate him with an anti-psychotic drug without a sufficient showing of need for the medication in order to proceed to trial. This Court granted a new trial because it was clearly possible that side effects of the medication "impacted not just Riggins' outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Riggins*. 118 L.Ed.2d at 490. In a concurring opinion, Justice Kennedy voiced agreement with the majority as follows:

> When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (suppression by the prosecution of material evidence favorable to the accused violates due process); Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (bad faith failure to preserve potentially useful evidence constitutes a due process violation).

Id. at 492 (Kennedy, J., concurring).

The concerns the Court expressed in the forced medication context apply with equal

---

weight of the undisputed facts to the contrary found in the Court below.

force, as the Illinois Supreme Court apparently recognized, to the present context where Richard Nitz was unknowingly ingesting a psychotropic drug with potentially severe side effects at the behest of the State. Therefore, the Illinois Supreme Court's holding is entirely consistent with, and mandated by, the holdings in *Riggins*, *Brady*, and *Youngblood*, *supra*.[6]

In addition, *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975), both teach that the right to have the trial court make inquiry into fitness for trial arises under certain circumstances. In those cases, the circumstances were that defense counsel before trial had brought to the court facts which raised a *bona fide* doubt of fitness, but the trial court had failed to make inquiry on the fitness question. Here, the circumstance showing a due process violation is that facts existed at the time of trial which, if they had not been shielded by the State from defense counsel and the court, would have required inquiry and, ultimately, because of Illinois' statutory scheme, a fitness hearing. This holding is entirely consistent with the teachings of *Pate* and *Drope*.[7]

---

[6] Richard Nitz argued to the Illinois Supreme Court that the State's failure to disclose the medication was a violation of due process under *Brady v. Maryland*, 373 U.S. 83 (1963), pointing out that the Supreme Court had held in *People v. Sanchez*, 169 Ill. 2d 472, 485-86, 662 N.E.2d 1199 (1996), that the State's withholding of information relevant to fitness for trial constituted a *Brady* violation (albeit harmless in that case). The Illinois Supreme Court stated: "Given our determination that defendant is entitled to a new trial based upon a violation of his right to an inquiry on the issue of his fitness, we do not address defendant's *Brady* claim. But see *People v. Sanchez* [citations omitted]." *Nitz*, 173 Ill. 2d at 165; Petition at App. 14. The Petition should be denied because the *Brady* violation presents a valid alternative holding for the Illinois Court's grant of a new trial.

[7] It also follows a long line of Illinois precedents which the Court below expressly relied upon. *See Brown v. People*, 8 Ill. 2d 540, 545, 134 N.E.2d 760 (1956), *People v. McLain*, 37 Ill. 2d 173, 226 N.E.2d 21 (1967); *People v. Smith*, 44 Ill. 2d 82, 254 N.E.2d 492 (1969); *People v. Murphy*, 72 Ill. 2d 421, 430, 381 N.E.2d 677 (1978); *People v. Harris*, 113 Ill.App.3d 663, 447 N.E.2d 941 (1983); *People v. Eddmonds*, 143 Ill. 2d 501, 578 N.E.2d 952 (1991); *People v. Brandon*, 162 Ill. 2d 450, 643 N.E.2d 712 (1994). *Nitz*, 173 Ill. 2d at 155.

Finally, the Illinois Court's holding is entirely consistent with *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), which held that where a State confers a statutory right, a "defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only" after he has received benefit of the statutory right, so that the liberty interest created by the statutory right "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." Here, the State's failure to disclose its medicating of Mr. Nitz arbitrarily deprived him of his substantial and legitimate expectation that under Section 104-21(a) he would not be put to trial while on psychotropic drugs without a judicial determination of his fitness.

Given that the Illinois Supreme Court's opinion is well-grounded on this Court's precedents, there is no reason to grant the writ.

III. THE DECISION BELOW HAS NO IMPACT BEYOND RESPONDENT'S UNIQUE CASE.

The State asserts that the Illinois Supreme Court's decision in this case is having "an enormous impact statewide". Petition at 8. Even if that assertion were true, that is not an appropriate ground for this Court to hear this case. This is not an instance of a federal court imposing burdens on a state judicial system, but, rather, an instance of the highest court of the State choosing that burden after careful deliberation:

> [W]e are cognizant of the costs and burdens which, as a result of this disposition, must be born by our criminal justice system. However, not even our greater interest in the finality of judgments can outweigh the safeguarding of a defendant's right not to be tried while unfit.

Nitz, 173 Ill. 2d at 164; Petition at App. 13.

The State's assertion, moreover, is untrue. Based on the Respondent's survey of claimants' attorneys in each of the 71 cases that the State cites in its Appendix C to the Petition,

App. 17-25, only one -- that of Richard Nitz, the Respondent -- would be affected by any action this Court might take in this case. That is, first, because 42 of the listed cases are in trial court or direct appeal status[8]: those claims are all based on statutory error or ineffective assistance of counsel and are not dependent on the due process claim raised here.

Second, of the remaining 29 cases in post-conviction status, the only one whose claim is based on due process grounds alone is that of Richard Nitz. *See* Petition at App. 25. All of the others are based solely or partially on the Sixth Amendment claim of ineffective assistance of counsel for failure to seek a fitness hearing.

The Illinois Supreme Court has already ruled favorably on the Sixth Amendment claim in three cases on direct appeal, *see* Petition at 11-12, and those holdings would not be affected by any action this Court might take in the present case.[9] In none of these three cases did the State seek review in this Court.

The decision below in this case will continue to have very limited impact, if any, because it turns on facts that are particularly unique. Of the 71 cases listed by the State in Appendix C to the Petition, this is one of the very few instances, if not the only one, where the State withheld information from the defendant and his counsel that it was medicating the defendant.

---

[8] In addition to the 35 cases that the State acknowledges in its appendix are on direct appeal, the 42 include: Jeffrey McKay (DeKalb Co.),Robert Nelson (Grundy Co.), Jerry Mitchell (Kane Co.), James Snyder (Peoria Co.), William Horton (Rock Island Co.), Robert Johnson (Rock Island Co.), and Donald Quickle (Tazewell Co.).

[9] It is well established that an attorney may be constitutionally ineffective for failure to adequately protect his or her client's rights under applicable state statutes, rules, or case law. *See, e.g., Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993); *Prichard v. Lockhart*, 990 F.2d 351 (8th Cir. 1993); *People v. Pugh*, 157 Ill. 2d 1, 623 N.E.2d 255 (1993).

Finally, the state statute on which the "impact" argument was based is no longer in effect. Any interpretation of this statute, thus, has no prospective effect, as of December 13, 1995, or December 31, 1996 (Pub. Act 89-0689, § 90) -- depending on whether the constitutionality of the 1995 amendment is ultimately upheld on appeal. See Petition at 11n. 7.

For these reasons, this Court's intervention is not required. The floodgates are secure.

CONCLUSION

For the foregoing reasons, Respondent Richard Nitz respectfully requests that the Court deny the petition for writ of certiorari filed by the State of Illinois.

Respectfully submitted,

AVIVA FUTORIAN
Counsel of Record
2440 North Lakeview Avenue
Chicago, Illinois 60614
773/348-3899

RICHARD E. CUNNINGHAM
3445 North Janssen Avenue
Chicago, Illinois 60657
773/472/0096

No. 96-1051

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF ILLINOIS, *Petitioner,*

v.

RICHARD C. NITZ, *Respondent.*

On Petition for Writ of Certiorari to the
Supreme Court of the State of Illinois

CERTIFICATE OF SERVICE

The undersigned Counsel of Record for the Respondent, Richard C. Nitz, hereby certifies that one copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* were served by U.S. mail, first class, postage prepaid, to Petitioner's counsel Arleen C. Anderson, Esq., Assistant Attorney General, State of Illinois, 100 West Randolph Street, 12th floor, Chicago, Illinois 60601, telephone number 312-814-2235, this 6th day of February, 1997. All parties required to be served have been served.

AVIVA FUTORIAN
Counsel of Record
2440 North Lakeview Avenue
Chicago, Illinois 60614
773/348-3899

Counsel for Respondent,
RICHARD C. NITZ